

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

HICHEM CHIHI, et al,	.	Case No. 4:18-cv-00123
	.	
Plaintiffs,	.	
	.	
v.	.	
	.	
CATHOLIC HEALTH INITIATIVES, et al,	.	515 Rusk Street Houston, TX 77002
	.	
Defendants.	.	Wednesday, December 4, 2019 2:34 p.m.
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TRANSCRIPT OF SCHEDULING CONFERENCE
BEFORE THE HONORABLE CHARLES ESKRIDGE
UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES CONTINUED.

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1 (Proceedings commence at 2:34 p.m.)

2 THE COURT: Last, we have -- is it Chihi? Chihi v.
3 Catholic Health Initiatives, 4:18-cv-123.

4 And we have multiple, multiple attorneys and parties
5 here, which is fine. Is it going to make more sense? I -- I'm
6 not sure that I need everybody. You're welcome to all come
7 gather here. I don't know how -- if that's really going to
8 work. Do y'all want to array yourselves, come into the wall as
9 much as you can, or sit wherever you need to. But I'll let
10 people have time to approach if they need to make individual
11 positions. Why don't y'all organize yourselves however you
12 need to be, but I don't think I need -- unless there's a
13 designated lead for the defendants' side and a designated lead
14 for the relator side, why don't we all just proceed from
15 counsel table. Does that make sense?

16 MS. BROWN: Okay. Are you on your -- are you -- I'm
17 counsel for relator.

18 THE COURT: Relator. And are you here on your own?
19 On your own? Okay. Why don't you take this side? And if
20 there -- if y'all want to share half the table with your
21 opponent, that's fine with me. If you prefer not, that's also
22 fine with me, but I -- just letting as many people down here as
23 possible.

24 Okay. We ready to go? Do I need appearances from
25 everyone? Happy to take it if we think we're all going to be

1 on the record.

2 MS. BROWN: Ruth Brown for the relator.

3 MS. BRINKMAN: And Sarah Brinkman on behalf of Baylor
4 College of Medicine, Baylor Medicare, Dr. Sista, and Dr. Katz.

5 MR. FUNK: Asher Funk on behalf of Catholic Health
6 Initiatives and CHI-St. Luke's.

7 MR. COFFEY: Kevin Coffey for Catholic Health
8 Initiatives and CHI-St. Luke's.

9 MR. CLARK: Michael Clark for Apnix.

10 THE COURT: Okay. Anyone else need to appear?

11 UNIDENTIFIED: The rest of us may just join in, but
12 we -- can be introduce ourselves if we need to speak?

13 THE COURT: Why don't we just go -- we'll go ahead
14 and get the appearance. And then I'll also ask you to
15 reintroduce yourself -- and throughout this portion, if each of
16 you, when you start, after a pause, re-introduce so that we
17 make sure we know who's on the record. Okay, please.

18 MS. HAZELWOOD: Kay Hazelwood for Bone and Joint
19 Clinic of Houston.

20 MS. ELMORE: Debbie Elmore for Surgical Associates of
21 Texas and Dr. James Livesay.

22 MR. SCOTT: I'm John Scott, Your Honor, for
23 Defendants Pulmonary Critical Care and Sleep Medicine
24 Consultants, Carl Dahlberg, Alberto Colamar, Jose Santacruz,
25 and Andres Mesa.

1 THE COURT: Okay.

2 MR. GEISLER: Good afternoon, Judge. Chuck Geisler
3 here on behalf of Leachman Cardiology Associates and Drs.
4 Leachman, Lopez and Krajcer.

5 MR. WOZNY: Ryan Wozny here for Houston Thyroid and
6 Endocrine, Dr. Elhaj, Dr. Jogi, Dr. Cherem, and Dr. Douglas.

7 MS. VIRENE: Lauren Virene here for Dr. Singh, Kidney
8 and Hypertension Consultants, Kidney Associates, Greater
9 Houston Gastroenterology, and Dr. Rajiman.

10 MS. BARRY: Virginia Barry here for Center for
11 Entity, Texas Endocrinology Group, Dr. Fishman, Hoffman, Moses,
12 Hung, and Boccalandro.

13 THE COURT: Okay. How many -- I haven't counted it
14 up. Give or take a couple, how many defendants do we have in
15 this action altogether? Anybody done the math?

16 MS. BROWN: I believe we have 36 remaining. They
17 were initially 39, but we reached a resolution with three of
18 those.

19 THE COURT: All right.

20 MS. BROWN: Defendants may correct me if I'm wrong.

21 MR. FUNK: Thirty-five or thirty-six sounds about
22 right.

23 THE COURT: Thirty-five or thirty-six? Okay.

24 Okay. There are a number of different motions that
25 are pending and have been pending in this qui tam action. I'm

1 going to do what I can to start to understand an order in which
2 to take them up and resolve them. I'll start with -- and these
3 are -- it's going to be somewhat out of order. And I will tell
4 you, please, there's so many of you, everyone, please be
5 seated. And at your option, if you -- when you're speaking,
6 you can stand if you want to. For purposes of this when
7 there's so many, you don't have to. Just make sure you're
8 close enough to a mic, I guess, so that our court reporter can
9 hear you.

10 The motion to strike, Paragraphs 114 through 120 from
11 the first amended complaint. I'm going to take these out of
12 order. This one is, like, deeply related into other things.
13 But this is Docket Number 172.

14 Just a question for -- I mean, for relator, you all
15 have not seen it because it's sealed and has not been served.
16 Is that right?

17 MS. BROWN: That's correct.

18 THE COURT: Okay. So on the CM/ECF system, you see
19 that it's been filed, but you can't get ahold of the PDF.

20 MS. BROWN: That's correct.

21 THE COURT: Okay.

22 For defendants, so you haven't served it on relator,
23 so they can't respond to it. What's your position on how I'm
24 supposed to proceed?

25 MR. FUNK: So, Your Honor, we have a couple options.

1 Out of an abundance of caution, because we did ask that the
2 document be sealed, we didn't want to just serve it absent some
3 instruction from the Court. One of the options we had
4 considered -- and Ms. Brown can indicate if she's okay with
5 that -- would be to modify the proposed order with a motion to
6 seal that would explicitly give us permission to serve it on
7 relator, so they can have a copy. And then, Your Honor can
8 rule as you see fit on the motion.

9 THE COURT: I think that the local rules provide --
10 once sealed, once a seal is granted, that it's -- the local
11 rules state because it goes on the CM/ECF and it's not
12 available to opponent, that you then have to serve it. So I
13 don't know that we need an order for that.

14 MR. FUNK: Okay. And I don't believe it has been
15 sealed, Your Honor. At this point, I think we filed a motion
16 to seal, but I don't believe there had been an actual ruling
17 sealing it, I don't think.

18 THE COURT: You did file it under seal --

19 MR. FUNK: Yeah.

20 THE COURT: -- because Docket 172 is indicated as
21 under seal. If -- I will say if that motion -- I guess
22 actually I had that question as to whether it had been so
23 ordered, which was Docket 173, the motion for leave to file it
24 under seal. You think that hasn't been ruled on yet?

25 MR. FUNK: Our saying, Your Honor, is it has not.

1 Certainly, if the local rules so provide and you grant the
2 motion to seal, we'd have no issue serving the motion on the
3 relator.

4 THE COURT: Okay. It has been -- the underlying
5 document has been filed under seal. I'm going to grant --

6 MS. BROWN: Your Honor, if I could be heard on that.

7 THE COURT: Sure.

8 MS. BROWN: We contest the motion to seal, at least
9 in part. And we can't respond to the motion to seal in
10 substance until we see the motion to strike. This is why we've
11 asked for it. The basis on which we contest the motion to seal
12 is that, you know, the allegations in our complaint that were -
13 - that we proposed to be filed under seal for adjudication on
14 this privilege dispute, you know, we have no objection to those
15 being sealed. But some of the legal argumentation has already
16 been placed on the record by the CHI defendants, and so we
17 don't see any reason why that -- a redacted version of the
18 motion to strike shouldn't be filed on the public record.

19 THE COURT: How about this? I mean, here's -- I
20 think that I'm inclined right now to grant the motion to seal.
21 That doesn't preclude you from -- after you see it, to move to
22 lift the seal. But we've got -- have to do something so that
23 you can get it into your hands so that you can respond to it on
24 the merits. It does -- I mean, the assertion about it is that
25 the paragraphs are attorney-client privileged material, which

1 this Court is sensitive to. I understand that you may not
2 agree that that is, and I'll receive argument on that in the
3 future. But right now and on the face of it, it's referencing
4 a law firm giving advice. At least on that basis, it's enough
5 for me to say that I'm going to grant the motion to place it
6 under seal.

7 Is there anything about that filing -- my rules, if
8 you haven't looked at my procedures yet, unlike some of the
9 other judges, I've put -- and I know that it was -- you filed
10 all this months --

11 MS. BROWN: With Judge Ellison, yeah.

12 THE COURT: Yeah. That I have a provision that if
13 something is going under seal that a proposed redacted version
14 be made available to file that's not under seal. And I know
15 that you've got concerns about those paragraphs themselves.
16 Most everything else about it, I don't think -- there's a lot
17 in it that it's not privileged. It's just your argument at
18 citing law, citing whatever. You're going to get it. I would
19 ask you all to work out -- you're going to have your response
20 ultimately to their motion, but I would ask you all to work
21 cooperatively on what a redacted version would be that we can
22 put on the public record. Look at my court procedures in that
23 regard.

24 And so let's have a proposal on that within two weeks
25 for a redacted version. Okay. And please work cooperatively

1 on that. Okay. Don't parse it too fine on how far the
2 privilege goes. Don't be too hard on, oh, that's not
3 privileged at all. You're going to have the ability to try to
4 move to lift under seal. I'm going to try to get something
5 that's on the public record right now while you litigate the
6 bigger thing, but don't try to fight it all the way one way or
7 the other on just the redacted version. Okay.

8 MS. BROWN: Yes, sir.

9 THE COURT: All right.

10 We've got -- where are we -- we have a motion to --
11 well, I say "motion," there's various motions -- to stay
12 discovery. Relator has a motion for leave to amend the
13 complaint. And we also have a lot of motions to dismiss.
14 Those are sort of the big tranches that we have.

15 On staying discovery, let's look at staying discovery
16 first. On -- what have the parties accomplished in terms of
17 any discovery today? It seems to me none at all, but correct
18 me to the extent I'm wrong.

19 MS. BROWN: That's correct.

20 THE COURT: And have there been -- and we still have
21 motions to dismiss. Do we have initial disclosures that have
22 been done in this case?

23 MS. BROWN: No, Your Honor.

24 THE COURT: So -- is that correct?

25 MR. FUNK: That's correct, Your Honor.

1 THE COURT: All right. And give me brief argument on
2 the reason to stay discovery. Five minutes each side, if you'd
3 like that, if you need as much.

4 And we'll start with defendant since it's your
5 motion. Are you speaking for everyone or --

6 MR. FUNK: So I believe, Your Honor, the initial
7 motion to stay discovery was brought by my clients, CHI,
8 CHI-St. Luke's, and I believe a number of the other defendants
9 have signed on to agree to those -- that motion to stay
10 discovery.

11 THE COURT: Okay.

12 MS. BRINKMAN: And, Your Honor, I can address why the
13 referring physicians or the referring practice groups, as
14 relator has characterized us, why it's especially important for
15 the stay of discovery to be in place for us specifically.

16 THE COURT: So why don't we start with that then, if
17 you want to.

18 MS. BRINKMAN: Thanks, Judge.

19 So reading the complaint, Your Honor, relator has
20 broad, ambiguous claims out of Stark law and anti-kickback
21 statute violations that relator then suggests violated the
22 False Claims Act. The problem with the complaint, Your Honor,
23 is that there is no allegation that any of the referring
24 physicians or the practice group had any knowledge about any
25 sort of scheme to defraud. And, Your Honor, I'd like the Court

1 to take notice of a case that just recently came out from the
2 Western District on a False Claims Act case. It's United
3 States ex rel Integra Med Analytics v. Baylor, Scott & White.
4 And the court acknowledged and was very detailed about why it's
5 so important for the specific complaint to allege facts
6 establishing the knowledge of the defendants of this scheme.

7 And what would happen here, Judge, if we're exposed
8 to full discovery in this case at this point, first, we don't
9 know which claims are going to exist after the motion to
10 dismiss are ruled on. We don't know which defendants are going
11 to be in or out. There are a lot of allegations that lump all
12 of the defendant referring physicians together. There's no
13 particularity described about our specific conduct that would
14 relate to each of the defendants. You can't lump all of the
15 defendants into one group under the False Claims Act, under a
16 fraud case.

17 And so we're looking for -- we don't have notice.
18 That's our problem. We don't know what the relator is
19 complaining that we did in this case. And she -- and the
20 allegations don't include any specifics about knowledge that we
21 would have had to have engaged in this conspiracy to defraud
22 the government. So that's our concern about opening this into
23 discovery at this point is that we think it would really unduly
24 burden and cause huge expense for all of our clients, private
25 physicians, to undergo this type of discovery.

1 THE COURT: Okay. Okay.

2 MR. FUNK: Did you want to come back to me, Your
3 Honor?

4 THE COURT: Do you have sort of different discovery
5 issue or arguments that you want to raise?

6 MR. FUNK: I do, Your Honor. Just from the
7 hospital's perspective, let me touch on a number of issues.

8 THE COURT: Okay. So let's -- let me hear a
9 response. I don't want to --

10 MR. FUNK: That's no problem.

11 THE COURT: -- double up on her when -- let me take
12 it one at a time. So based on that, what's your counter?

13 MS. BROWN: We obviously disagree. The relator is
14 pleading a single unitary scheme by which the hospital was
15 providing remuneration to the defendant, referring physicians
16 through this international services department and then getting
17 Medicaid and Medicare referrals back and billing the government
18 for those. And the scope of the discovery is not going to
19 change. Even if my opposing counsel is right that the
20 referring physicians are -- you know, that we didn't plead
21 knowledge and they're no longer -- they're going to be
22 dismissed from the case, they will still be subject to
23 subpoenas for the same body of information because the scheme
24 will still involve them.

25 You know, we disagree that the claims are going to

1 change and that a meaningful witness could impact discovery.
2 And that is because we've already streamlined the case in
3 response to the motion to dismiss, and what is left is -- as I
4 described to you, it's false claims and Texas Medicare Fraud
5 Prevention Act claims that are of only about those four
6 categories of remuneration from the hospital defendants to
7 referring physicians. And so if a conspiracy claim or a False
8 Claims Act is dismissed or one of the -- you know, one of the
9 Texas state law claims is dismissed, the body of discoverable
10 information is going to remain the same.

11 Similarly -- well, I guess I can stop there. I guess
12 I can -- you know, I can also add one point, which is that we
13 disagree with the characterization that we haven't alleged
14 knowledge or participation by the defendants or any physicians.
15 We did that at length in the initial complaint, and then we
16 also supplemented. The defendants said they wanted more
17 notice, and so we made it even more clear in the proposed
18 second amended complaint. And that is before the Court.

19 This is not a frivolous case. This is a case where
20 the State of Texas has filed a statement of interest. The
21 allegations are robust and, you know, relator and the State of
22 Texas and the federal government and the public are all -- you
23 know, have interest in the case progressing.

24 THE COURT: On that, I know the second amendment
25 complaint is not the operative complaint now. The motion to

1 stay discovery is as to the first amended complaint, and your
2 argument, which is well stated as to what's in the first
3 amended complaint, is it -- do you have the same argument under
4 the second amended complaint?

5 MS. BRINKMAN: Same argument, Your Honor.

6 THE COURT: Okay.

7 MS. BRINKMAN: If you compare the first amended
8 complaint with the second amended complaint, there's not much
9 else that is put in the first amended complaint, except for
10 some exhibits to the first amended complaint are then
11 incorporated into the body of the second amended complaint.

12 THE COURT: Right.

13 MS. BRINKMAN: There isn't very much substance that's
14 added. She relies on -- relator's counsel relies on an
15 argument that the volume of patients and referrals would have
16 given the physician's knowledge of this purported scheme. Your
17 Honor, that's simply not enough. That's not enough under the
18 rules to give us notice as to what knowledge or participation
19 we had in this case. And the complaint is completely devoid of
20 any particularity on a specific referral that then resulted in
21 a false claim that was submitted to the government. So that
22 alone, Judge -- we don't have any specifics here. It truly is
23 (indiscernible) of --

24 THE COURT: I hear that working as to -- that that's,
25 you know, carrying the load towards the motion to dismiss. I

1 don't know why it would stay discovery, but let me hear the
2 other argument, just in terms of overall policy on -- in this
3 type of qui tam action. There's always a lot of defendants.
4 There's always a lot of motions to dismiss, and what the
5 typical practice is in the courts, whether or not to stay
6 discovery while a very complicated set of briefs is sorted out.
7 That may be what you're planning to address. Include something
8 along those lines if it's not.

9 MR. FUNK: So, Your Honor, I think the critical
10 factor that you want the Court to not lose sight of is even if
11 you do allow leave to amend the complaint. Our core
12 allegations in the motion to dismiss would also have effect on
13 the proposed second amended complaint. And here, because it is
14 a False Claims Act case governed by Rule 9(b), we believe we
15 have an entitlement to test the legal sufficiency both as to
16 does it state a cause of action under 12(b)(6) and does it mean
17 Rule 9(b) before we are forced to engage in extremely
18 complicated, extremely costly discovery. So even if you look
19 at the second -- proposed second amended complaint and say,
20 well, we streamlined certain things, we've modified things, the
21 core issue of testing the sufficiency of the complaint remains
22 top of mind for us. So I think that that's one factor that the
23 Court should consider.

24 Second, I think the case management report is a good
25 example of the unfortunate level of burden that all parties

1 will face. We're talking about hundreds of interrogatories,
2 dozens of depositions, collection off ESI. I mean, I don't
3 pretend to speak for the other physician defendants. It's
4 going to be costly and difficult. It's not in the interest of
5 the parties or any judicial economy for us to darken your
6 doorstep with discovery disputes, especially because, Your
7 Honor, the motion to dismiss is fully briefed. The only motion
8 that's outstanding is the motion to strike at this point.
9 Everything else is before the Court.

10 And I would say significantly too, there needs to be
11 a burden demonstrated by relator in this action for you to, you
12 know, stay discovery. Here, there is no burden.
13 Department of Justice, they took a long hard look at this case
14 and they declined to intervene. They are not here, Your Honor.
15 I would disagree with relator that the fact that the State of
16 Texas filed a statement of interest has any bearing on the
17 merits. There are other qui tam cases that I've litigated here
18 where they file it to preserve their rights under their
19 statute, and that's fine.

20 THE COURT: That is not persuasive based on the
21 statement of interest that the State of Texas filed. That was
22 a statement of, you know, declination, but it was not a
23 statement that your -- the claims were subject to being
24 stricken.

25 MR. FUNK: I don't disagree with that

1 characterization, Your Honor.

2 THE COURT: Okay.

3 MR. FUNK: They were -- the State of Texas has a very
4 strong interest -- and we've seen it in other FCA cases here --
5 in protecting their statute because they believe that there are
6 certain differences between the federal False Claims Act and
7 the TMFPA. So I don't -- I wasn't saying that they weight it
8 either way on the merits. I would say that they didn't weigh
9 in either way on the merits.

10 And again, it's a decline case. It's a case where
11 the delays in this case have been out of a lot of the parties'
12 control. I mean, the time the government took to investigate,
13 the -- you know, you're lucky third for a judge in this matter,
14 unfortunately. Those factors, I don't think, would counsel in
15 favor of any kind of not denying the stay.

16 And then finally, two, spoliation is not an issue. I
17 can say on behalf of my clients, as an officer of the court,
18 that we've taken our obligation to preserve seriously, that we
19 are preserving documents. I just -- I don't think that the
20 arguments about the burden or the interest of justice are what
21 you drive today when you balance those against the enormous
22 burden on the litigants and the court.

23 THE COURT: Okay.

24 MS. BRINKMAN: And, Your Honor, if I may just address
25 one other thing. In many of our cases, the relator will agree

1 to a stay of discovery during the pendency of motions to
2 dismiss because they also don't want the burden of their
3 spending money on discovery.

4 THE COURT: I understand.

5 MS. BRINKMAN: In this case, it's a little bit
6 unusual. And I guess the only other thing that I would point
7 out is that here, we have -- if we start discovery, Your Honor,
8 it's truly going to affect the lives of all the physicians.

9 THE COURT: I understand. I understand.

10 Final thoughts on that.

11 MS. BROWN: Yes. So if I could just take opposing
12 counsels' thoughts in order -- or (audio interference) order
13 here.

14 You know, the False Claims Act statute purposely does
15 not include a stay of discovery pending motions to dismiss,
16 unlike other federal statutes, and I think that's indicative of
17 the fact that Congress intended for these cases to be pursued
18 expeditiously. And in this case, that is very appropriate.
19 You know, opposing counsel said there's no harm to us without
20 going forward. But, you know, to the contrary, the delays in
21 this case are going to be enormous. You know, if the -- if we
22 have to wait until the Court adjudicates 11 motions to dismiss,
23 there may be another, you know, leave to amend. You know,
24 there are -- that's going to be -- that's a lengthy period of
25 time. And you know, the --

1 THE COURT: Can I just interrupt you? If --did I
2 just hear you say that if I grant your ability to amend so that
3 you can file your second amended complaint, when they move to
4 dismiss again, are you saying that you're going to be back
5 seeking leave to amend again?

6 MS. BROWN: No, Your Honor.

7 THE COURT: Okay. Because I want to make sure of
8 that.

9 MS. BROWN: No, Your Honor.

10 THE COURT: We're going to be turning to that next.
11 Okay. Continue.

12 MS. BROWN: Yes. And so, you know, the process is
13 going to be lengthy. And in that lengthy period of time,
14 memories are going to fade. And there is a concern about
15 spoliation, and that is because we haven't received the initial
16 disclosures from the defendants yet, so we don't know who are
17 the persons with knowledge. We don't know who has ESI that
18 hasn't been preserved and, you know, what other entities they
19 say may have knowledge. And so there certainly is a concern
20 about spoliation and also just the delay of litigation.

21 THE COURT: Are you counsel on other qui tam actions
22 --

23 MS. BROWN: I am, yes.

24 THE COURT: -- for relator? Is the representation
25 correct that a lot of courts grant stay of discovery while

1 motions to dismiss are pending?

2 MS. BROWN: Well, I don't know if I can speak to --
3 you know, I can only say that --

4 THE COURT: I don't need percentages, but, I mean,
5 tell me your experience or what your survey of the case law is.

6 MS. BROWN: I mean, that is -- my survey of the case
7 law is that that is -- sometimes the case -- that is typically
8 the case when the complaint is facially invalid. And just a
9 preliminary review indicates that this is not going to be a
10 successful case. And the Court has to do a preliminary
11 investigation to see whether or not this is a case that is
12 frivolous and is just a fishing expedition into misconduct.
13 And we invite you to look at, you know, the paragraphs that we
14 cited in our second amended complaint. We have specifically
15 identified the conduct at issue. We have provided
16 particularized examples of it.

17 And, you know, the opposing counsel suggested that
18 the proposed second amended complaint doesn't make substantive
19 differences, but we disagree with that. You know, the
20 defendants asked for a lot of additional information, and
21 whether or not we felt it was required by the rules, we
22 provided it. And so that second amendment complaint is, you
23 know, even more so a basis to deny a stay of discovery.

24 THE COURT: Okay.

25 MS. BROWN: We would like to move forward.

1 MR. FUNK: Your Honor, could I just add one point, if
2 I may.

3 THE COURT: You can.

4 MR. FUNK: I think part of the concern here is we got
5 a first amended complaint. It was just, you know, they filed
6 the original complaint. We got the amended complaint. We
7 moved to dismiss, and we see, as to the claims, substantively,
8 a seismic shift in the parties and the claims and some of what
9 was there. Okay. That may be a good thing as far as
10 streamlining the case. We don't disagree with that.

11 THE COURT: It should make you happy.

12 MR. FUNK: But it does make me somewhat happy, but we
13 don't believe it goes far enough. And our concern is that
14 under Rule 9(b), what happens, Your Honor, if you permit
15 discovery. They obtain discovery on claims that weren't
16 sufficiently pled, even in this proposed second amended
17 complaint, and then that forms the basis for them to try and
18 amend again or refine claims. It just -- the function to pause
19 for a moment, given where we are in this case, we just -- we
20 feel strongly about that, Your Honor. So --

21 THE COURT: I hear an argument -- arguments about
22 burden of costs, that if I allow discovery, that's a burdensome
23 cost, so I should stay discovery. I also hear that you spent a
24 lot of time briefing your motions to dismiss, and if I grant
25 that, there's a burden and a cost that you have to go do that.

1 So it's don't grant discovery and don't let them amend because
2 y'all shouldn't be incurring any costs. I think you can hear
3 where I'm sort of thinking about this. We're going to turn to
4 the motion to amend in just a second, but as we go forward, I'm
5 inclined to say that discovery is going to pause while we
6 consider what will be the motions to dismiss that need to be
7 resolved. But I do think that I have some questions that I
8 want to ask about the leave to amend, but I think -- obviously
9 I'm thinking of granting the leave to amend so that we're -- I
10 mean, we have a second amended complaint that's out there.
11 It's not operative yet. And that we have one and only one
12 target that we're shooting at, and that would be the only
13 target. I'm not going to be hearing another leave to amend if
14 I'm understanding prior representation of counsel. Correct?

15 MS. BROWN: Yes. There was only one small issue on
16 that.

17 THE COURT: Okay.

18 MS. BROWN: And that is that as of November of this
19 year, there was a potential retaliation claim that has just
20 accrued. We are evaluating that. It's very recent, and it's
21 really too early to see what are the damages and whether it's
22 something that's going to be brought. But with that -- setting
23 that aside --

24 THE COURT: But that's bringing a whole new claim
25 based on a new set of occurrences. It's not trying to plead

1 better into claims that have already been made. Correct?

2 MS. BROWN: That's correct, yes.

3 THE COURT: Okay. I note that, and I wouldn't have a
4 problem with that if it -- if that exists.

5 On the leave to amend the complaint, I hear your
6 argument about having seen your motions and then they've jumped
7 the gun and come up with another complaint, but also in these
8 qui tam cases, and just in procedures generally, I mean, this
9 is the first time -- this is the only time that we're having a
10 leave to amend having seen motions to dismiss -- we didn't get
11 to the first amended complaint via a motion to dismiss prior
12 set of proceedings. Correct?

13 MS. BROWN: Correct.

14 THE COURT: Okay. It strikes me as not unusual that
15 when the complaint is there's not enough particularity, that
16 it's a matter of what needs to be pleaded, that leave be given
17 to correct those types of issues. And I understand the burden
18 and expense of needing to re-brief some things. And so I'm
19 willing to entertain arguments about that, but I'm just letting
20 you know where I'm thinking about this right now.

21 So on the motion for leave to amend. It's your
22 motion, but I think really I have questions for them unless you
23 want to start and say anything further on the motion.

24 MS. BROWN: No, Your Honor.

25 THE COURT: Okay.

1 MS. BRINKMAN: And I appreciate that, Your Honor. So
2 we had spoke on behalf of our clients, Baylor College of
3 Medicine, Baylor Medicare, Dr. Sista, and Dr. Katz. Reached to
4 relator several times to state our concerns about the complaint
5 as it had been pled, the first amendment complaints. I know
6 other defendants in this courtroom had done the same to say,
7 we're concerned that these are not -- you are not alleging
8 certain things against these defendants in a way that gives us
9 notice or knowledge. Then, we all go ahead. The relator
10 declines to dismiss even Baylor Medicare, which is not an
11 actual entity that exists, declines to dismiss them. We all
12 file our briefing on the motion to dismiss on the first amended
13 complaint, and then relator comes back to us and says, oh, I'd
14 like to amend our complaint, can we -- can I amend it.

15 THE COURT: But -- and linking back to your prior
16 argument. And we have it locked in. The second amended
17 complaint is going to be it, and I think that you argued
18 previously there's still not enough there.

19 MS. BRINKMAN: Agreed.

20 THE COURT: And so I would think that you would want
21 to adopt and brief into that situation, knowing that that's
22 going to be the one that the Court really is going to dispose
23 of one way or the other. So you can continue.

24 MS. BRINKMAN: And we do do that in Baylor -- the
25 Baylor defendants do do that in the reply and the response to

1 the motion to amend in stating why it's futile to allow the
2 second amended complaint to be entered at this point.

3 THE COURT: Yeah.

4 MS. BRINKMAN: Because of, again, the lack of
5 particularity as to each of the defendants' conduct that is at
6 issue here.

7 THE COURT: Okay.

8 MR. FUNK: So, Your Honor, for us, one of the --

9 THE COURT: Can I -- I'm sorry, can I get your
10 appearance for the record, just to get the name.

11 MR. FUNK: Asher Funk on behalf of --

12 THE COURT: Asher. Okay. Thank you.

13 MR. FUNK: -- CHI and CHI-St. Luke's.

14 I think one of the concerns that we have, Your Honor,
15 I'll tell you from my False Claims Act practice, both here and
16 in the Northern District of Illinois, where I know Ms. Brown
17 also practices, typically when you have an amendment midway
18 through briefing on a motion to dismiss, it's because it's the
19 first amendment as a matter of right. It is atypical for a
20 party who's already gotten their one freebie to then come back
21 after we've shown the cards and say, no, I'd like to amend.
22 And obviously, that's why we're before, you know, Your Honor on
23 this issue.

24 Part of our concern collectively is while it's good
25 that the case has been streamlined, we have a right and we

1 believe that the Boudreaux (phonetic) and (indiscernible) case,
2 which is Fifth Circuit law, provides that the abandonment
3 voluntarily of these claims provides insufficient certainty for
4 our clients. Because in theory, she could re-raise those in a
5 later point based on discovery or other issues. There is, we
6 believe, an entitlement when a party seeks to amend and sort of
7 draw claims midway through briefing a motion that there should
8 be some disposition of those so in other words --

9 THE COURT: But they will need leave my leave to --

10 MR. FUNK: Yes.

11 THE COURT: -- to add that claim in the future.

12 Right?

13 MR. FUNK: Well, correct. And I think part of what
14 this goes to, Your Honor, is if -- our position is we opposed
15 leave, certainly. But if you are inclined to grant it, that
16 there be some parameters around what it is, that it's not just,
17 you know, certain claims that have fallen away sort of that
18 occurs voluntarily, that those could be re-raised, that they
19 could be, you know, subject to discovery. I think we're
20 looking for some certainty from the Court about those claims
21 that relator's walking away from by virtue of the proposed
22 second amended complaint.

23 THE COURT: And is that -- I mean, I know that there
24 were the other state law claims that are no longer there. I
25 certainly haven't looked at all of those different statutes.

1 Do they vary much between Texas, vis-à-vis the states, versus
2 FCA? I know there's difference between FCA and Texas.

3 MR. FUNK: Your Honor, part of our, you know,
4 frustration is that there were state law claims that were
5 brought that if any investigation was done initially, they
6 never should have been in the complaint. They're for disparate
7 states thousands of miles away that were seemingly only brought
8 because the parent entity, Catholic Health Initiatives, which
9 we think shouldn't be a defendant in this action, does business
10 in those jurisdictions. There are no ticks and ties between
11 the defendants in this case in many of the jurisdictions that
12 relator has, you know, walked away from claims on.

13 So, I mean, they're just -- I think the history here
14 leaves us a little bit concerned, and that's part of why we
15 have asked respectfully for a ruling on the proposed -- sorry,
16 the first amended complaint, our motion to dismiss, to inform
17 what the complexion of any further or future amendment looks
18 like from Your Honor.

19 THE COURT: On those claims that you've dropped into
20 your second commended amended complaint -- and they were
21 disparate. I didn't go down the line to see all compare claim
22 to claim, but there are other states. Do you foresee bringing
23 any of those back?

24 MS. BROWN: We don't, Your Honor. If they're not in
25 our proposed second amended complaint -- and, you know, the

1 only thing we would ask is based on what the government
2 entities have told us, they should be dismissed without
3 prejudice as to the government entities re-asserting them.

4 THE COURT: So that the government entities, if they
5 chose to reassert them, they could, but you, on behalf of
6 relator, will bind your client that you will not reassert them.

7 MS. BROWN: That's correct.

8 THE COURT: Does that give you the comfort that you
9 need?

10 MR. FUNK: I mean, I'd want to kind of see what it
11 is. And again, our position remains the same, but I understand
12 also where you're going, Your Honor, as far as your view of the
13 burden of streamlining the case.

14 THE COURT: And we're not finished with argument on
15 this, but I mean, as to that concern, which I hadn't thought
16 about -- I don't know that I can do something that's with
17 prejudice vis-à-vis the government entities.

18 MR. FUNK: You're correct. Your Honor, we'd also
19 want to look at that. I believe there are several States that
20 were initially included that don't even have qui tam statutes,
21 where there may be acts that, you know, govern certain conduct
22 against the Medicaid programs, but there isn't a specific qui
23 tam provision that allows for that.

24 THE COURT: Is anything -- is any -- I don't know
25 that we need anything to say anything about any of the

1 governmental entities.

2 MR. FUNK: It could just be as to relator, but I
3 mean, I -- there are also defendants that were voluntarily
4 dropped from this. I mean, there was -- the complexion of the
5 complaint -- this is part of my frustration is it's just -- a
6 lot's changed.

7 THE COURT: Right. I understand. Go ahead.

8 MS. BROWN: If I could speak to that. You know, the
9 only thing that has happened is that there has been
10 streamlining. There's been nothing new, and we've been very
11 clear in docket entries as to what we were agreeing not to
12 pursue, which is very common among --

13 THE COURT: Well, I would at least argue that there's
14 something new since it's the second amended complaint. I mean,
15 there's got to be a reason for it. I understand that there's
16 no new claims, right?

17 MS. BROWN: That's what I --

18 THE COURT: Causes of action. There's no new causes
19 of action.

20 MS. BROWN: No new --

21 THE COURT: You've only dropped causes of action.

22 MS. BROWN: No new theories and no new causes of
23 action.

24 THE COURT: Okay.

25 MS. BROWN: That's correct. Just more detail that

1 the defendants asked for.

2 THE COURT: As to the causes of action that you have
3 dropped, are you stipulating on behalf of your client that if I
4 grant leave to file the second amendment complaint, you will
5 not seek to reassert them in this action?

6 MS. BROWN: Yes. And they're not in the second
7 amended complaint. We have not tried to, you know, renew
8 something that we agreed to dismiss.

9 THE COURT: Okay. All right. Well, we have that
10 stipulation on the record, so we'll -- we have that for what it
11 is. And obviously, if anything comes up that wants to be
12 re-added at this point, it's at my discretion, and I'm sure it
13 will be brought to my attention that there was this colloquy.

14 The statement of interest by Texas was filed after
15 the motions to dismiss and perhaps even after the reply, I'm
16 not sure. I'm not sure. It goes to my question of, is there a
17 position by the defendants -- you know, we're very early in
18 this case, you know, in it's relative life, but we're up to
19 Docket Number 253, at least. So it's a lot. Has there been a
20 position statement by the defendants with respect to what the
21 State of Texas put in? There might be. I just didn't locate
22 it.

23 MR. FUNK: I'm sorry, Your Honor. I was just talking
24 to --

25 MS. HAZELWOOD: Yeah. Kay Hazelwood for Bone and

1 Joint of Houston. I think that several of the defendants,
2 including Bone and Joint, filed a reply. The statement of
3 interest by the State of Texas, May 31st at Docket 204. Our
4 followed shortly after. I don't have the docket in front of
5 me, Judge. It looks like --

6 MS. BRINKMAN: Your Honor, it was on July 1st, 2019,
7 Docket Number 219.

8 MS. HAZELWOOD: I don't think we were the only ones
9 that filed a response, though. I believe that other parties
10 did, as well. MS. BRINKMAN: There was --

11 MS. BROWN: There were other ones that -- other
12 responses at Docket 211 and 232.

13 THE COURT: 211, 219, 232 are as to the State of
14 Texas's position?

15 MS. BROWN: Yes.

16 THE COURT: Okay.

17 MS. BROWN: I'm sorry, one more. 226.

18 THE COURT: I'm sorry?

19 MS. BROWN: Also, 226.

20 THE COURT: Okay. There are also -- the State of
21 Texas's statement refers to two relatively recent cases, Patel
22 v. Catholic Health Initiatives, and -- which is 312 F.Supp.3d
23 580 --

24 MR. FUNK: Your Honor, I can vouch for the
25 familiarity. That was one of the cases that myself and Mr.

1 Coffey worked on, so --

2 THE COURT: Yeah. But that's a different Catholic
3 Health Initiatives case, correct? It was before Judge Ellison.

4 MR. FUNK: Correct.

5 THE COURT: Okay. And then, the other is -- I think
6 it's Hayden -- is that right? Yeah. Hayden v. Abundant Life
7 Therapeutic Services, recent decision from Judge Rosenthal,
8 2019 WL 1930274.

9 Are -- at least with one of the cases, I know that
10 you're familiar. Are you all familiar with -- are all three of
11 you familiar with both of those cases?

12 MS. BRINKMAN: I'm familiar with the Catholic Health
13 Initiative case. I'm not as familiar with the other one that
14 you referenced.

15 THE COURT: Okay.

16 MS. BROWN: I'm not so familiar.

17 THE COURT: Okay. If -- you know, I have read
18 through these cases, and at the end of the day, it seems like
19 the short reference is that the FCA claims were dismissed. The
20 Texas claims are dismissed without prejudice to file in state
21 court. Correct?

22 MR. FUNK: That's correct. Your Honor. That's what
23 occurred at least in the Patel matter.

24 THE COURT: All right. Is that where -- I would just
25 like to know before we get into motion to dismiss briefing on -

1 - going to the expense and burden that we're talking about --
2 is that where we're going in this action? Am I ultimately
3 going to be dismissing the FCA claims and sending the Texas
4 claims to a Texas court? I'll let you start.

5 MS. BROWN: We don't believe so. You know, this
6 scheme of remuneration in exchange for referrals is something
7 that the government has expressly warned. The government has
8 sent out notices cautioning hospitals and referring physicians
9 that there should be no flow of money or in kind,
10 administrative assistance, or anything like that coming from
11 hospitals to referring physicians who are then providing
12 referrals back to the hospital because that has all sorts of
13 deleterious effects on the Medicaid and Medicare programs and
14 on patient health. And this scheme that has been alleged here
15 is exactly that, it's that you know, the international services
16 department was providing free interpreters, free administrative
17 assistance. Basically they had a whole staff of administrative
18 assistants that were doing the work that the physicians
19 themselves and their offices are supposed to provide in
20 exchange. What they received is, you know, is the loyalty of
21 providing the referral -- you know, the Medicare and Medicaid
22 referrals back to them. And this, you know, as I said, it was
23 something that the government has warned against. The
24 relationship was -- fell outside of the scope of any safe
25 harbor that the statute allows for. And so, you know, we don't

1 think the cases are going to be -- should be dismissed.

2 THE COURT: In terms of -- I mean, it's not
3 dispositive on what the text of either statute says and whether
4 you've pleaded it correctly, but in terms of remedies at the
5 end of the day, if you only had your Texas claims, are you able
6 to avail yourself of the same or similar remedies that the FCA
7 would provide you?

8 MS. BROWN: Not at all because the money that would
9 go to the federal government under the Medicare program, we
10 couldn't recoup for any of that. We can't recoup the civil
11 remedies.

12 THE COURT: Okay.

13 MS. BROWN: They don't cover the same damages.

14 THE COURT: Okay. All right. That makes sense.

15 MR. FUNK: Your Honor, just to make sure I understand
16 your question, are you simply asking if, in the event you grant
17 the motion to dismiss as to the FCA counts, what the
18 disposition should be as to the TMFPA counts?

19 THE COURT: Basically. But I mean, I'm looking at --

20 MR. FUNK: Yeah.

21 THE COURT: -- Hayden and Patel, and the result was -

22 -

23 MR. FUNK: My --

24 THE COURT: -- dismissed without prejudice, refiling
25 in state court.

1 MR. FUNK: And my understanding based on Judge
2 Ellison's ruling and the relevant Fifth Circuit law is that
3 typically speaking, federal court, when there's both a qui tam
4 case and also state claims, that the court should, if they
5 dismiss the FCA matter, decline to exercise its supplemental
6 jurisdiction over the TMFPA because the state is the expert on
7 adjudicating those claims.

8 THE COURT: Right.

9 MS. BRINKMAN: And, Judge, I'm racking my brain to
10 think of one case where a judge has dismissed the federal False
11 Claims Act claims, but then the relator then went into state
12 court to assert those in a state court under the state statute.
13 So obviously, the relator has that right to try under the state
14 statute. But typically if it's not sufficient under the
15 federal False Claims Act, it's not going to be sufficient under
16 the state (indiscernible).

17 THE COURT: Okay.

18 MS. BRINKMAN: Your Honor, I don't necessarily think
19 that would be the case here because as the State of Texas's
20 statement of interest makes clear, the Texas Medicaid Fraud
21 Prevention Act statute is broader in many ways than the federal
22 act --

23 THE COURT: Right.

24 MS. BRINKMAN: -- so it's not the case that dismissal
25 of the federal claims necessitates dismissal of the state

1 claims.

2 THE COURT: Well, at least dismissal without
3 prejudice, though.

4 MR. FUNK: Yeah.

5 THE COURT: It's dismissal on a jurisdictional ground
6 on the supplemental jurisdiction question that you're noting.

7 And obviously, you know, you were advised to be here
8 prepared to argue directly as to these cases. I have been
9 thinking about it in terms of -- let me say this. I'm going to
10 grant the motion for leave to amend, subject to the stipulation
11 that we got on the record about the claims that have been
12 dropped. And so that is going to be the operative complaint
13 that we're looking at.

14 I'm sensitive to the fact there's a lot of defendants
15 and how voluminous the briefing is. I'm wondering if you all
16 know enough about these cases that I have in mind, or cases
17 that are similar to them, to let's simply have a round of
18 briefing on those -- these two cases if I was to follow these
19 two cases and look at the second amended complaint. Is that --
20 it would still, I think, need to be a motion to dismiss. I'm
21 trying to think of a way that we don't have to do it in quite
22 so voluminous format as motions to dismiss typically are.
23 Because these two cases -- I mean, at some point, you know, the
24 fact patterns are changing, but the law and the result is set.
25 And if this is -- if the FCA claims in this case are on all

1 fours with those types of pleadings that were found to be
2 deficient, I think I would want to know that and that that
3 might streamline the briefing somewhat.

4 Is there comment or thought on how to do that short
5 of having it be part of motions to dismiss that are coming?

6 MR. FUNK: I mean, are you just asking, Your Honor,
7 for sort of narrow briefing on the issues of the similarity or
8 the similarity between the False Claims Act and the TMFPA? I
9 mean --

10 THE COURT: No, no, no, no. I have a handle on that.
11 I'm talking about between -- and I know that it's different --
12 you know, this is obviously not a cut-and-paste complaint. I'm
13 not suggesting that, that it's just like, oh, this is exactly
14 the same complaint that we've seen previously. So maybe we're
15 just going to need to go to motions to dismiss on this. But I
16 guess I will -- but the parties, obviously I've put you on
17 notice that I'm interested in the applicability of these two
18 cases to the case before me.

19 And I've also expressed that I have read closely the
20 State of Texas's statement of interest, which I've found
21 persuasive, but which I will note I did not know that there
22 were defense briefs that were already filed on that, which I'm
23 going to read again. I will tell you that I will read those
24 four briefs. I don't know if the State of Texas is going to
25 put in another statement of interest in response to the second

1 round of motions to dismiss. They might, they might not, but
2 since it's kind of a statutory construction issue, they might
3 not. When you're preparing your motions to dismiss, just note.

4 I mean, I think obviously the motions to dismiss that
5 are out there, they're being mooted, they're being terminated
6 because we're going to have to redo it. I don't know whether
7 it technically terminates the Docket 204 and the responses to
8 that, but I'm going to let you know that I'm going to be
9 looking at those. I'm going to be looking at the State of
10 Texas's brief when I'm looking at any motions to dismiss. So
11 bear that in mind because now you have obviously this statement
12 before you to the extent that it impacts what you want to say
13 in your motion to dismiss. Is that clear enough? I mean, do
14 you understand what I'm getting at?

15 MR. FUNK: Yeah, so we could certainly incorporate by
16 reference back to the Texas SOI or our responses to the SOI in
17 a future motion to dismiss the proposed second amended
18 complaint.

19 MS. BRINKMAN: Judge, I'm more than happy compile a
20 list of all the docket numbers and all of those replies. I
21 think there were more than four.

22 THE COURT: Okay.

23 MS. BRINKMAN: But I don't have the document in front
24 of me, and -- but I'm more than happy to send an email to your
25 case coordinator that lists all of those replies.

1 THE COURT: That would be great. If there's -- as to
2 -- so I don't need it as to the form of, like, there were the
3 motions to dismiss, responses and replies, but as to the Texas
4 statement and anything that is responsive to that, that would
5 be very helpful. Thank you. If you'll email it to my case
6 manager and also copy counsel of record.

7 MS. BRINKMAN: Okay.

8 THE COURT: Okay. Okay. So I think I've made
9 everyone sufficiently unhappy today. Is there other items to
10 enter at this point? We don't have a -- there wasn't a
11 proposed scheduling order given to me with joint case
12 management because of the outstanding issues. Is that right?
13 I mean, we don't have a proposed scheduling order right now.

14 MS. BROWN: We did submit one, but I don't know that
15 it makes sense to look at it (indiscernible) discovery.

16 THE COURT: Oh, true. There is one submitted, but no
17 dates were filled out. Right.

18 MS. BROWN: These were filled out on our prior --

19 THE COURT: Okay. But --

20 MS. BROWN: -- (indiscernible).

21 THE COURT: Okay.

22 MS. BROWN: They were contested.

23 THE COURT: Very contested. Okay. So I'm going to
24 hold off on a scheduling order also at this point. On -- so
25 the motion for leave to amend the second amended complaint is

1 granted, and so the second amendment complaint is out there
2 now.

3 How much time do you think you need to prepare
4 motions to dismiss? And I'm aware that Christmas and New
5 Year's are coming, so I'm sympathetic to that. And if you all
6 would like to -- do we want to take a break to, like, figure
7 out any scheduling issues or do y'all want to, you can just
8 discuss among yourselves. You want to take a five or ten-
9 minute break?

10 MR. FUNK: That'd probably be fine, Your Honor.

11 THE COURT: Is that --

12 MS. BROWN: That's fine. There's one thing I wanted
13 --

14 THE COURT: Yes.

15 MS. BROWN: -- to bring to your attention, you know,
16 regarding the motion to amend. And I just wanted to make sure
17 that it was clear in my earlier representation. So you asked
18 me whether after the defendants filed motions to dismiss, we
19 would then seek leave to amend, and I wanted to just make clear
20 that what I meant by that is not before this Court's ruling.

21 But pending -- you know, but based on this Court's ruling, if
22 there was a basis to supplement the allegations, we may indeed
23 seek to amend at that point. So I just wanted to make sure --

24 THE COURT: Okay. I -- That would be your right at
25 that point. But once they brief, I'm not going to see -- I

1 guess I'll say this. I'm not going to see because you won't
2 give it to me, but if you do, I'm not going to look at it,
3 another amended complaint.

4 MS. BROWN: That's correct.

5 THE COURT: Okay. But after my ruling, you can
6 procedurally, of course, attempt to do whatever you think you
7 need to do.

8 MS. BROWN: I just wanted to make sure that was
9 clear, but --

10 THE COURT: I think that that's implicit in what I
11 head said before, but --

12 MR. FUNK: And certainly Your Honor, we move to
13 dismiss this time. We'll be again asking the court to dismiss
14 with prejudice without leave to amend given the multiple
15 exercises in briefing and pleading this matter.

16 THE COURT: I understand.

17 MR. FUNK: But that's obviously within the Court's
18 purview.

19 THE COURT: That -- we're at the second amendment
20 complaint, so I definitely understand that, and I think that
21 you understand that too. But one never knows what happens in
22 litigation. So we'll take that up if necessary. Okay. A ten-
23 minute break, and --

24 MS. BROWN: Well, and I think we have consensus --

25 THE COURT: Okay.

1 MS. BROWN: -- that if we can have 60 days, if
2 defendants could have 60 days to file the motions to dismiss.

3 THE COURT: Okay. And that would take us to, what,
4 mid-December, mid-February. If you'll get -- look on a
5 calendar and if you'll propose a date in mid-February, that's
6 fine with the Court. Is that okay? I mean, 60 days seems
7 fine.

8 MS. BROWN: Yes, of course.

9 THE COURT: Okay.

10 MS. BROWN: And then, Your Honor, I understand from
11 your rules, each defendant has 5,000 words for --

12 THE COURT: We're going to need to talk about that.
13 I had another -- I will tell you, I have another qui tam case
14 in the random reassignment of cases to this Court.

15 MS. BROWN: I'm familiar with that case. We're also
16 representing --

17 THE COURT: Are you on that case, as well?

18 MS. BROWN: Yes, sir, I am.

19 THE COURT: And you saw my --

20 MS. BROWN: Yes, sir.

21 THE COURT: -- order, and you will be before
22 Magistrate Judge Johnson next week --

23 MS. BROWN: Yes.

24 THE COURT: -- to discuss the word limit there. I
25 think cumulatively, that was a request for 90,500 words --

1 MS. BROWN: There were -- the --

2 THE COURT: -- with 18 defendants.

3 MS. BROWN: In range with the response and the reply.

4 THE COURT: Exactly. And that was with 18
5 defendants, and here we have 36,000. So I'm not going to grant
6 180,000 words.

7 MS. BROWN: Understood.

8 THE COURT: What, in terms of word limits -- I'll
9 tell you what. You're going to be before Magistrate Judge
10 Johnson --

11 MS. BROWN: Yes, Your Honor.

12 THE COURT: -- next week arguing that. I assume you
13 all don't have an idea of how many words you need at this
14 point, and I'm not sure that it makes sense to set a word limit
15 right now pending what Magistrate Judge Johnson has to say
16 there. I'm going to, you know, take some guidance from that.
17 You might -- my procedures are set out as 5,000 words per
18 party, but it's really kind of 5,000 words per side, but I know
19 that that doesn't make sense in a case like this, but it is
20 certainly not license at all to add up every party and say, oh,
21 we each get 5,000 words because there's so much that overlaps.

22 And so let's do this. There's that hearing is -- do
23 you know what day that is? Is it Tuesday --

24 MS. BROWN: It's on Tuesday at two o'clock.

25 THE COURT: Tuesday next week? So why don't we do

1 this. Instead of setting now what the briefing deadline's
2 going to be -- and is anybody else here, any of the other
3 lawyers here also involved in that case and going to be at that
4 hearing before Judge Magistrate Johnson [sic]? Not a reason
5 for you to be, it's completely unrelated parties. Well, you'll
6 be there.

7 MS. BROWN: Yes, sir.

8 THE COURT: Is that correct? Why don't you report
9 back to your colleagues and why don't you talk with them based
10 on whatever she's ruling, or at least recommending to me. And
11 on that basis, come up with what your proposal on word limits
12 would be, and we'll see what we can work out at that point.

13 So let's say that by next Friday, you all will put in
14 a submission recommending a briefing schedule and recommending
15 word limits. And you can have one conversation with your
16 colleagues but have another conversation in good faith with
17 your opponent, agreeing to what those deadlines are going to be
18 in agreeing to what the word limits are. Whatever word limits
19 they're going to ask for, you're going to be very happy with
20 whatever number of words it means for you as the one and only
21 party, but get agreement on at least a proposal. And your
22 colleague here can tell you that I was not happy with the
23 request that went out on that one, and so in terms of coming up
24 with a way to do unified briefing that is targeted will be
25 appreciated by the Court.

1 MS. BROWN: Understood.

2 THE COURT: Okay. Okay. All right. So by next
3 Friday, we'll have a proposal in on that. That will hopefully
4 be a joint proposal.

5 MS. BROWN: Yes, Your Honor.

6 THE COURT: Okay. Anything else? And then I'm going
7 to look at my notes to see if I have anything further.
8 Anything else that anybody wants to raise? Okay. Let me look
9 through everything I've got up here. I think that may be it.

10 MS. BROWN: Your Honor, are you granting the motion
11 to stay discovery then?

12 THE COURT: I am. I am. Yeah. The discovery will
13 be stayed until I rule on motions to dismiss. And when I get
14 those motions, we're going to -- it's going to be long. It's
15 going to take a while, but we are going to turn to them. I
16 won't be thinking, oh, these are way back on my six-month list.
17 I'm going to turn to them and try to rule on them. Okay.

18 MS. BROWN: Thank you, Judge.

19 THE COURT: All right. And let me see if I've got
20 anything else. And that may be famous last words, but that
21 will be what I intend to do.

22 MS. BRINKMAN: Your Honor, I have a copy of that page
23 I referred to earlier in the hearing for the Court and for
24 opposing counsel. Can I hand that up to you?

25 THE COURT: Yes, please. And do you have one for

1 relator?

2 MS. BRINKMAN: I do. I do.

3 THE COURT: Thank you.

4 THE COURT: Okay. That is all I have. Do you have
5 some -- it looks like you have something further?

6 MR. FUNK: Just one procedural question, Your Honor.
7 With the redacted version of the motion to strike, I'm
8 presuming that in addition to Ms. Brown, we should serve that
9 on the other parties as well when we actually provide the
10 unredacted copy -- or the redacted copy.

11 THE COURT: I think so. I mean, I think that that's
12 what is -- do we have a protective order in this case?

13 MR. FUNK: We do not.

14 MS. BROWN: Not yet.

15 THE COURT: It's sealed, so obviously you're not
16 supposed to share it on that basis. It's an -- it's a
17 suggestion that there's attorney-client, so I understand that.

18 MR. FUNK: Yeah.

19 THE COURT: I will tell you by serving it, by doing
20 all of this, you're not waiving attorney-client privilege.

21 MR. FUNK: Yeah.

22 THE COURT: Do you have any concern about sharing it
23 with the other parties?

24 MR. FUNK: I don't. I think we've just been very
25 cautious to avoid any sort of a waiver-related argument, but

1 you're recognizing that, so I don't think we're concerned.

2 THE COURT: Okay. Okay. So yes.

3 I think that's all I have. Okay. Thank you,
4 everyone.

5 MR. FUNK: Thank you.

6 MS. BRINKMAN: Thank you.

7 MS. BROWN: Thank you.

8 THE COURT: You're excused.

9 (Proceedings concluded at 3:36 p.m.)

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C E R T I F I C A T I O N

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16 I, Alicia Jarrett, court-approved transcriber, hereby
17 certify that the foregoing is a correct transcript from the
18 official electronic sound recording of the proceedings in the
19 above-entitled matter, and to the best of my ability.

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Alicia J. Jarrett

ALICIA JARRETT, AAERT NO. 428

DATE: October 22, 2020

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